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FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

SEP 14 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 TeleCorp PCS, Inc. Tritel, Inc. and)
 Indus, Inc. Seek FCC Consent to)
 Transfer Control of, or Assign,)
 Broadband PCS and LMDS Licenses)

WT Dkt. No. 00-130
 DA 00-1589

**OPPOSITION TO MOTION TO STRIKE REPLY COMMENTS OF
 LEACO RURAL TELEPHONE COOPERATIVE, INC. AND COMANCHE COUNTY
 TELEPHONE COMPANY, INC.**

Leaco Rural Telephone Cooperative, Inc. ("Leaco") and Comanche County Telephone Company, Inc. ("Comanche") (collectively "Petitioners"), by their attorneys and pursuant to § 1.45 (b) of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), hereby oppose the "Motion to Strike of TeleCorp PCS, Inc. *et al.*, or, in the Alternative, Request for Leave to File Substantive Response to Late Filed Comments" ("Motion") filed by TeleCorp PCS, Inc. ("TeleCorp") and its subsidiaries and affiliates (collectively "Applicants") on September 1, 2000. Applicants request that the Commission strike the reply comments filed by Petitioners ("Reply Comments") and Alpine PCS, Inc. ("Alpine") supporting the comments of Nextel Communications, Inc. ("Nextel").¹ In the event that the Commission does not strike the Reply Comments, Applicants request leave to respond.

Applicants allege that the Reply Comments amount to a late-filed *de facto* "petition to deny" which Petitioners lacked standing to file pursuant to Section 309 of the Communications Act of 1934, as amended (the "Act"). Motion pp. 1-3. Applicants argue that the Commission should not accept Petitioners' Reply Comments and should strike them from the record. The Applicants are wrong.

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I. PETITIONERS' PLEADING WAS PROPERLY AND TIMELY FILED

Petitioners' Reply Comments do not constitute a late-filed *de facto* petition to deny. The Commission established a docket and invited parties to file comments or petitions to deny regarding the proposed merger of TeleCorp and Tritel, Inc. ("Tritel") and related transactions.² The Commission also modified the *ex parte* rules to permit presentations to Commission decision makers in this proceeding.³

Nextel filed comments raising various issues and requesting that the FCC require TeleCorp to provide additional information to demonstrate how it and the proposed merger companies comply with the designated entity rules. Nextel, however, did not categorically request denial of the applications.⁴ Petitioners supported Nextel's request that the Commission carefully examine the proposed transactions for compliance with the rules. More importantly, in order to foster administrative efficiency, and to avoid possible contradictory results, Petitioners alerted FCC staff of other proceedings in which substantially identical legal questions and factual patterns are at issue.⁵ Petitioners explained that the resolution of the issues in this proceeding may fundamentally impact the outcome in the other proceedings.

¹ See Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc. filed August 16, 2000 ("Nextel Comments/Petition").

² See TeleCorp PCS, Inc. Tritel, Inc., and Indus, Inc. Seek FCC Consent to Transfer Control of, or Assign, Broadband PCS and LMDS Licenses, *Public Notice*, DA 00-1589 (released July 17, 2000) ("Merger PN").

³ See *id.* p. 4 (adopting permit-but-disclose *ex parte* procedures). TeleCorp has already made non-restricted *ex parte* presentations to the Commission. See Letter from Eric DeSilva to Magalie Roman Salas, dated September 1, 2000.

⁴ See Nextel Comments/Petition p. 2 ("If TeleCorp/Tritel can explain the discrepancies discussed below to the Commission's satisfaction, the instant applications could be approved.").

⁵ Petitioners alerted the Commission to the pending petitions to deny ("Petitions") applications seeking FCC consent to assign or transfer various C and F block licenses to TeleCorp's affiliates, Southwest Wireless, L.L.C. ("Southwest") and Royal Wireless, L.L.C. ("Royal") (collectively "Assignees"). See File Nos. 0000178796, 0000177844, 0000178897, 0000179413, 0000163408, 0000163410.

Applicants do not, and could not, challenge the Commission's power to seek information in connection with the merger applications necessary to make the public interest determination required by Section 309 (a).⁶ Petitioners properly and timely filed the Reply Comments in response to the Commission's request.⁷ Had they so chosen, Petitioners could also have challenged TeleCorp's eligibility to hold C and F block licenses by filing an informal complaint pursuant to § 208 of the Act or styled the Reply Comments as a permitted written *ex parte* presentation.

In addition to attacking Petitioners' right to respond to the *Merger PN*, Applicants also argue that Petitioners raised issues in the Reply Comments that Nextel did not raise in its initial pleading. Motion p. 3. Specifically, Applicants allege that Petitioners raised issues regarding the applicability of the grandfather provision of § 24.839 and the "normal growth" rule for the first time in the Reply Comments.

Applicants' assertion is simply wrong as evidenced by Applicants' discussion of these issues in the "Joint Opposition of TeleCorp PCS, Inc. *et al.* to the Petition to Deny of Nextel Communications, Inc." ("Joint Opposition"). For example, in the Joint Opposition, Applicants state, "Finally, Nextel argues that 'grandfathering' provisions of Section 24.839 do not apply..."⁸

⁶ When considering an application pursuant to Section 309 (a) of the Act, the Commission must determine whether the public interest, convenience, and necessity will be served by granting the application and for such purpose the Commission may consider the application and such other matters as the Commission may officially notice, and the Commission may require the applicant to submit additional information. See 47 U.S.C. §§ 308 (b) & 309 (a).

⁷ With respect to Applicants' argument that Petitioners' pleading is "late-filed," Petitioners also note that they filed the Petitions attached to the Reply Comments on August 4, 2000, and served copies on TeleCorp's counsel. Accordingly, both TeleCorp and the FCC were fully aware of Petitioners' arguments regarding §§ 24.709 and 24.839 well in advance of the August 16, 2000 deadline for filing petitions in this merger proceeding. Petitioner's August 28, 2000 Reply Comments presented no new arguments not previously presented in the Petitions.

⁸ Joint Opposition p. 12 (*citing* Nextel Comments/Petition at 7 n. 17, add'l footnote omitted); see also *id.* pp. 15-16. Nextel specifically argued that TeleCorp and Tritel fail to demonstrate that the merged entity qualifies to acquire C and F block licenses pursuant to § 24.839 (a) (2) either

Nextel also specifically challenged TeleCorp's continuing qualification as an entrepreneur by questioning TeleCorp's calculation and reporting of its total assets.⁹ Nextel advised the Commission that the assets TeleCorp reported to the FCC in the TeleCorp assignment applications differed significantly from the total assets reported to the Securities Exchange Commission ("SEC"). Nextel also quoted from footnote 12 of the TeleCorp assignment application. Footnote 12 indicates that the assets TeleCorp reported to the FCC in the assignment applications were based on historical rather than current data.¹⁰ The only logical conclusion to draw from Nextel's argument is that TeleCorp's assets (as evidenced by its SEC filing) must have grown to exceed the applicable cap since the last time TeleCorp calculated its assets.

Although Nextel did not explicitly reference the "normal growth" rule, Nextel's challenge to TeleCorp's calculation and reporting of its total assets coupled with Nextel's demonstration that the historical asset figure reported to the Commission differed significantly from more current information reported to the SEC clearly placed the normal growth rule at issue in this proceeding.¹¹ Accordingly, the Reply Comments do not raise any new issues not raised by Nextel, and were timely and properly filed in response to the *Merger PN*.

II. APPLICANTS FAIL TO JUSTIFY THEIR REQUEST FOR LEAVE TO FILE A SUBSTANTIVE RESPONSE IN CONNECTION WITH THE MOTION

Applicants also request leave to respond to the Reply Comments and have included such response in the Motion. As explained above, Applicants previously had the opportunity to

on its own pursuant to § 24.709 or as a proposed assignee that currently holds other C or F block licenses.

⁹ See Nextel Comments/Petition p. 2.

¹⁰ Specifically, footnote 12 explains that the total asset figure reported in the applications represented the assets of TeleCorp and its affiliates prior to Auction No. 22. See TeleCorp PCS, Inc., FCC Form 603 (April 2000) n. 12.

address, and did address at length in the Joint Opposition, the applicability of the grandfather provision of § 24.839 to the proposed transactions. Applicants also had the opportunity, but effectively declined to respond to the questions regarding their compliance with the financial caps of § 24.709. Having previously responded to Nextel's § 24.839 arguments and having elected not to address financial issues raised by Nextel, Applicants lack justification for addressing these issues in the Motion. To the extent that the Commission considers Applicants' additional arguments as an *ex parte* presentation, however, Petitioners provide the following limited response.

III. LIMITING THE SCOPE OF THE GRANDFATHER PROVISION OF § 24.839 TO ACTUAL LICENSEES RATHER THAN AFFILIATES OF LICENSEES SERVES NUMEROUS REGULATORY PURPOSES

Applicants argue that they could indirectly accomplish, through a two-step process, the ultimate transaction that they propose. They argue that Petitioners do not identify any "regulatory purpose" for requiring such a result. Motion p. 8. In the replies to the oppositions of TeleCorp's affiliates, Southwest and Royal, Petitioners identified numerous regulatory purposes for limiting assignments and transfer to entities that actually hold other C or F block licenses. Specifically, limiting the scope of the grandfather provision of § 24.839 to actual *licensees* rather than affiliates of such licensees: (1) allows the Commission an opportunity to review such proposed assignees' compliance with the continuing eligibility requirements of § 24.709; (2) allows the Commission to evaluate the nature and structure of a specific transaction to a specific entity rather than a hypothetical or phantom transaction; (3) limits the number of non-qualifying entities that may hold substantial equity interests in designated entity licenses through companies

¹¹ Although Applicants had the opportunity to respond to Nextel regarding the calculation and reporting of TeleCorp's assets, Applicants effectively chose not to by arguing that TeleCorp's gross revenues were "irrelevant." See Joint Opposition p. 8.

that exceed the applicable financial caps; and, (4) affords protection to existing investors in grandfathered entities who undertook substantial risk in the competitive bidding process.¹²

IV. CONCLUSION

The Reply Comments were timely and properly filed in response to the *Merger PN* and raised no new issues not raised by Nextel. Accordingly, for the reasons set forth above the FCC should deny the Motion and consider the arguments contained in the Reply Comments.¹³

Respectfully Submitted

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¹² For a discussion of these policies, see Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, Inc. Reply to Joint Opposition to Petition to Deny, pp. 7-11, filed August 29, 2000 (lead File Nos. 0000178796, 0000177844).

¹³ In the event that the Commission granted the Motion, Petitioners could always present the same information as permitted *ex parte* presentation, but this would be unnecessary waste of Commission and company resources.

CERTIFICATE OF SERVICE

I, Fatmata Deen, an employee of the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing "Opposition to Motion to Strike Reply Comments of Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, Inc." was sent by hand delivery this 14th Day of September, 2000, or via U.S. mail where indicated, to the following:

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